NO. 26961

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

JOSEPH R. and ROSE A. BENTO,
Plaintiffs-Appellees,

vs.

VALLEY ISLE MOTORS,
Defendant/Cross-Claimant-Appellant/Third-Party Plaintiff-Appellant,

and

SAFE-GUARD PRODUCTS, INTERNATIONAL, INC.,
Defendant/Cross-Claim Defendant-Appellee,

and

RED SWAN, INC.,
Third-Party Defendant-Appellee,

and

DOE DEFENDANTS 1-50,
Defendants/Third-Party Defendants.
(NOS. 26961, 27004, & 27325)

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIV. NO. 03-1-0114(2))

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

In these consolidated appeals, defendant/cross-claimant-appellant/third-party plaintiff-appellant Valley Isle Motors, Ltd. (Valley Isle) appeals in No. 27325 from the May 2, 2005 judgment of the circuit court of the second circuit, the Honorable Shackley Raffetto presiding, dismissing all of

Valley Isle's claims against defendant/cross-claim defendant-appellee Safe-Guard Products International, Inc. (Safe-Guard) and third-party defendant-appellee Red Swan, Inc. (Red Swan).

Valley Isle also separately appeals, in Nos. 26961 and 27004, from the November 8 and December 6, 2004 orders of the circuit court, the Honorable Shackley Raffetto presiding, finding the two settlements between the plaintiffs-appellees Joseph R. and Rose A. Bento and Safe-Guard and Red Swan, respectively, to be in good faith,[1] pursuant to Hawai'i Revised Statutes (HRS) § 663-15.5 (Supp. 2004).[2]

On appeal, Valley Isle challenges the applicability of HRS § 663-15.5 to the dispute, pointing out that Act 300[3] --

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[1] On January 26, 2006, this court consolidated Nos. 26961, 27004, and 27325 under No. 26961.

[2] HRS § 663-15.5, entitled "Release; joint tortfeasors; co-obligors; good faith settlement," provides in relevant part:

> (b) For purposes of subsection (a) [setting forth the rights of non-settling joint tortfeasors and co-obligors with regard to settlement agreements], any party shall petition the court for a hearing on the issue of good faith of a settlement entered into by the plaintiff . . . and one or more alleged tortfeasors[.]
>
> . . . .
>
> (d) A determination by the court that a settlement was made in good faith shall:
>
> (1) Bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor, except those based on a written indemnity agreement; and
>
> (2) Result in a dismissal of all cross-claims filed against the settling joint tortfeasor or co-obligor, except those based on a written indemnity agreement.
>
> (e) A party aggrieved by a court determination on the issue of good faith may appeal the determination. . . .

[3] Act 300, section 6 provides in relevant part that "[t]his act shall apply to . . . [a]ny release, dismissal or covenant given after this act takes effect, regardless of the date of the occurrence of the underlying claim, except for claims arising out of a contract made prior to January 1,

(continued...)

which was later codified as HRS § 663-15.5 -- states that the Act shall not apply to "claims arising out of a contract made prior to January 1, 2002" and alleges that the Bentos' claims arise out of a contract entered prior to that date. Valley Isle also argues that the settlements did not meet the good faith standard of HRS § 663-15.5 as set forth in Troyer v. Adams, 102 Hawai'i 399, 77 P.3d 83 (2003).

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the judgment and orders of the circuit court for the following reasons:

In Troyer, this court considered the effect of Act 300, section 6(1). The Troyer majority concluded:

> First, reading Act 300, § 6(1) in pari materia with Act 300, § 6(2), see supra note [3], which instructs that the Act applies to "contract claims where the contract was made on or after January 1, 2002," it is reasonable to construe the exclusion of "claims arising out of a contract made prior to January 1, 2002" simply to exclude from the purview of the Act the type of claims that the following subsection includes, the only difference being the date of the underlying contract.
>
> . . . .
>
> In light of the foregoing, we conclude that Act 300, § 6(1) simply excludes from the Act's purview releases, dismissals with or without prejudice, or covenants not to sue or not to enforce a judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 2002. There is no logical reason to construe the exclusion more broadly.

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[3](...continued)
2002[.] See 2001 Haw. Sess. L. Act 300, §§ 6 and 7 at 877, effective June 28, 2001. This portion of Act 300 was not included in the codified language of HRS § 663-15.5, see supra note 2.

102 Hawai'i at 412-13, 77 P.3d at 96-97. Therefore, because it is clear from the evidence in the record that neither the claims asserted by the Bentos against Valley Isle and Safe-Guard nor the potential claim of the Bentos against Red Swan were claims against co-obligors on an alleged contract debt, they are not excluded from the purview of HRS § 663-15.5 by Act 300, section 6(1).

The circuit court did not abuse its discretion in determining that the settlements reached by the Bentos with Safe-Guard and Red Swan were in good faith, inasmuch as: (1) there remained substantial questions of liability; (2) the settlement involved the disgorgement of all revenues received by the settling parties from the conduct in question; (3) the circuit court could have reasonably concluded that the amount paid in settlement was in reasonable relationship to the relative fault of the settling parties; (4) there was no evidence that the settlement was collusive or intended to harm Valley Isle; and (5) Safe-Guard's promise to procure insurance naming Valley Isle as an additional insured did not comprise a written indemnity agreement by Safe-Guard within the meaning of HRS § 663-15.5(d)(1), see Vesta Ins. Co. v. Amoco Prod. Co., 986 F.2d 981, 986 (5th Cir. 1993) (an indemnity clause in a contract for services does not make the indemnitor an insurer); Kinney v. G.W. Lisk Co., 556 N.E.2d 1090, 1092 (N.Y. 1990) ("An agreement to procure insurance is not an agreement to indemnify or hold harmless, and the distinction between the two is well recognized.") (emphasis in original) (internal citations

omitted); Robley v. Corning Cmty. Coll., 521 N.Y.S.2d 861, 863 (App. Div. 1987) ("A contract to procure or provide insurance coverage is clearly distinct from and treated differently than an agreement to indemnify.").

Therefore,

IT IS HEREBY ORDERED that the judgment and orders from which the appeals are taken are affirmed.

DATED: Honolulu, Hawaii, April 16, 2007.

On the briefs:

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